No. B131655

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MARCIA SPIELHOLZ,
on behalf of herself and all others similarly situated,

Plaintiffs/Petitioners,

v.

SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES,

Respondent;

LOS ANGELES CELLULAR TELEPHONE COMPANY and
AT&T WIRELESS SERVICES, INC.,

Defendants/Real Parties in Interest.

LOS ANGELES COUNTY SUPERIOR COURT No. BC 186787
HONORABLE WENDELL MORTIMER, JR., JUDGE PRESIDING

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF

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Exhibit 6

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. DISCUSSION 4

A. State Judicial Resolution Of Plaintiffs' Claims For Monetary Relief Is Preempted By Federal Law 4

B. The Superior Court's Decision Is Consistent With The Weight Of Authority 8

C. The Superior Court's Decision Will Not Interfere With The Enforcement Of Consumer Protection Laws 13

III. CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CALIFORNIA CASES

Burrus v. Municipal Court, 36 Cal. App. 3d 233 (1973) 4

Day v. AT&T Corp., 63 Cal. App. 4th 332 (1998) 2,8,9

Omaha Indemnity Co. v. Superior Court, 209 Cal. App. 3d 1266 (1989) 4

Ordway v. Superior Court, 198 Cal. App. 3d 98 (1988) 4

NON-CALIFORNIA CASES

AT&T v. Central Office Telephone, Inc., 118 S. Ct. 1956 (1988) 5,7,8

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 5

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 5

Bauchelle v. AT&T Corp., 989 F. Supp. 636 (D.N.J. 1997) 11,12,13

Bennett v. Altel Local Communications, 1995 WL 1054301 (M.D. Ala. 1996) 12

In re Comcast Cellular Telecom. Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996) 9,10

DeCastro v. AWACS, 935 F. Supp. 541 (D.N.J. 1994) 10,11

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 10,11

In re Petition of California to Retain Regulatory Authority over Intrastate Cellular Services, 10 F.C.C.R. 7486 (1995) 5

Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co., 858 F.2d 936 (3d Cir. 1988) 11

Sanderson v. AWACS, 958 F. Supp. 947 (D. Del. 1987) 11

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 5

Tenore v. AT&T Wireless Services, Inc., 962 P.2d 104 (Wash. 1998), *cert. denied*, 119 S. Ct. 1096 (1999) 10

Page(s)

Wegoland, Ltd. v. NYNEX Corp., 806 F. Supp. 1112 (S.D.N.Y. 1992) 9

Weinberg v. Sprint Corp., 165 F.R.D. 431 (D.N.J. 1996) 12

Page(s)

STATUTES AND REGULATIONS

47 C.F.R. §§ 1.1-1.52, 1.720-1.735 3

47 U.S.C. § 201(b) 3,13

47 U.S.C. § 207 3,13

47 U.S.C. § 332(c)(3)(A) 4,7,9

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL:

I.

INTRODUCTION

Plaintiffs, petitioners herein, allege that Los Angeles Cellular Telephone Company ("L.A. Cellular") misrepresented the quality and geographic scope of its cellular telephone service and that consequently L.A. Cellular's customers received service that was of lower value than that for which they contracted.[1] Plaintiffs thus complain that they got less than they paid for -- or, equivalently, that they have been overcharged for the cellular service that they did receive. They seek to remedy this putative overcharge through a state court award of damages and/or restitution. In order to award plaintiffs the monetary relief they seek, the Superior Court would have to determine a reasonable rate for the cellular service that plaintiffs actually received. That is because plaintiffs' claims for damages and restitution are based on the difference between the rate they *actually* paid for the service and the rate they claim they *should have* paid in light of the alleged deficiencies in the cellular service provided by L.A. Cellular.

Congress, however, has clearly and unequivocally preempted *any* state regulation of the rates that cellular service providers charge their subscribers. This federal prohibition, which applies to judicial as well as to legislative and administrative action, precludes the monetary relief that

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[1] L.A. Cellular recently changed its name to AB Cellular Holding, LLC, d/b/a AT&T Wireless Services. In light of the prior proceedings in this case, however, this brief will continue to refer to the company as "L.A. Cellular" for convenience and ease of reference.

plaintiffs seek in this case because calculating the relief would necessarily enmesh the Superior Court in precisely the type of state rate regulation that Congress has expressly proscribed. Accordingly, L.A. Cellular moved to strike plaintiffs' claims for monetary relief.

The Superior Court granted L.A. Cellular's motion to strike, correctly concluding that deciding plaintiffs' claims for monetary relief would require state judicial regulation of cellular rates, which is precisely what Congress has preempted. This conclusion was mandated by the express terms of the statute and is supported by applicable case law. *See, e.g., Day v. AT&T Corp.*, 63 Cal. App. 4th 325 (1998) (affirming the dismissal of claims for monetary relief because deciding those claims would improperly require the court to evaluate the reasonableness of telephone rates and, therefore, infringe on territory reserved to the Federal Communications Commission and/or the California Public Utilities Commission). The Superior Court in this case adhered to the clear congressional mandate that States, including their courts, lack jurisdiction to assess, adjust, set, or evaluate in any way the proper rate for cellular telephone service. Since the resolution of plaintiffs' claims for monetary relief would cross that preemptive threshold, L.A. Cellular's motion to strike those claims was properly granted.

There is no compelling need for this Court to review by extraordinary writ the Superior Court's decision granting L.A. Cellular's motion to strike. Contrary to plaintiffs' alarmist contentions, the Superior Court's decision does not "immunize" cellular telephone companies from claims of consumer fraud, nor does it "eviscerate consumer protections" established by law. *See* Pet. at 3. L.A. Cellular and other wireless telephone service providers remain subject to actions by both private plaintiffs and state en-

forcement officials for any transgressions of consumer protection laws. Plaintiffs in this very case are now pursuing their claims in state court under the same California consumer protection laws for injunctive and declaratory relief. To the extent that plaintiffs also can state claims under the Act, plaintiffs have the right to seek relief (including monetary relief) from the Federal Communications Commission or in federal court.[2]

Plaintiffs cannot, however, seek the essence of state rate regulation through the guise of a consumer fraud action, because Congress has made clear that state courts lack jurisdiction to consider claims seeking an adjustment to, or rebate on, cellular service charges. Plaintiffs are simply wrong to suggest that an award of damages or restitution in this case would have only an "incidental" or "indirect" effect on L.A. Cellular's rates. *See* Pet. at 27, 35. Plaintiffs' claims for monetary relief in this case would require the Superior Court to fashion a remedy based on its assessment of the reasonableness of L.A. Cellular's rates in light of its representations to current and prospective subscribers, and thus would retroactively return to subscribers a portion of the rates they paid. That is precisely the type of state regulation that Congress has expressly preempted.

---

[2] The Act requires that L.A. Cellular's "charges, practices, classifications, and regulations for and in connection with communication service, shall be just and reasonable." 47 U.S.C. § 201(b). Section 207 of the Act vests exclusive jurisdiction over claims arising under Section 201(b) in either federal courts or the FCC:

> Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission . . . or may bring suit for the recovery of damages . . . in any district court of the United States . . .

47 U.S.C. § 207. Applicable federal regulations also provide for both an informal and formal complaint process at the FCC for any consumer who believes that they have been injured by a violation of the Act. *See* 47 C.F.R. §§ 1.1-1.52, 1.720-1.735.

Because the Superior Court correctly granted L.A. Cellular's motion to strike plaintiffs' claims for monetary relief on the ground that resolution of those claims has been preempted by federal law, the petition for a writ of mandate or other extraordinary relief should be denied summarily.[3]

II.

DISCUSSION

Congress has expressly preempted all state regulation of cellular telephone rates. Resolution of plaintiffs' claims for monetary relief would require the Superior Court to evaluate the reasonableness of the rates charged by L.A. Cellular. Resolution of those claims is, therefore, preempted, and none of plaintiffs' arguments to the contrary suffice to avoid the clear import of federal law.

A. State Judicial Resolution Of Plaintiffs' Claims For Monetary Relief Is Preempted By Federal Law

The Federal Communications Act, as amended in 1993, expressly and unambiguously prohibits all state regulation of cellular telephone rates: "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any [wireless telephone service provider]." 47

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[3] Plaintiffs' claim that they will be "irreparably injured" absent the issuance of the extraordinary writ sought by the petition simply lacks merit. It is well settled that writ review of trial court orders, particularly at the pleading stage of the case, is an extraordinary remedy that is disfavored absent a showing that compelling circumstances warrant such relief. *Burrus v. Municipal Court*, 36 Cal. App. 3d 233, 236 (1973) *See also Ordway v. Superior Court,* 198 Cal. App. 3d 98, 101 n. 1 (1988) ("Appellate courts should not encourage the use of extraordinary writs as a method of reviewing rulings made in the law and motion department of the trial court.") In this matter, plaintiffs are aggressively pursuing their claims for injunctive and declaratory relief, and it is generally the case that the Court of Appeal is "in a far better position to review a question when called upon to do so in an appeal instead of by way of a writ petition." *Omaha Indemnity Co. v. Superior Court*, 209 Cal. App. 3d 1266, 1273 (1989).

U.S.C. § 332(c)(3)(A). As the Federal Communications Commission has explained in rejecting California's request to continue cellular rate regulation, the statute "express[es] an unambiguous congressional intent to foreclose state regulation in the first instance." *In re Petition of California to Retain Regulatory Authority over Intrastate Cellular Services*, 10 F.C.C.R. 7486 at ¶ 18 (1995). Congress thus displaced *all* state regulation of rates charged for cellular service. That express preemptive provision precludes resolution of plaintiffs' claims for monetary relief in this forum.

The federal preemption of state rate regulation extends to actions of the judicial branch. As the Supreme Court has explained, "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 n. 17 (1996); *see also, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief"). Thus, if an award of damages or other monetary relief would involve the court in reviewing or establishing cellular telephone rates, it is preempted. *Cf. Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981) (award of damages barred by filed rate doctrine). And, the fact that the resolution of a claim would not require the court to actually set rates is not determinative. As the United States Supreme Court has observed, "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. *Any claim for excessive rates can be couched as a claim for inadequate service and vice versa.*" *AT&T v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1963 (1988) (emphasis added).

In this case, plaintiffs explicitly alleged that they "*received substantially less service than that for which they contracted.*" Second Amended Complaint ¶ 33 (emphasis added). This is a claim going straight to the issue of L.A. Cellular's rates that is "couched as a claim for inadequate service. . . ." In determining whether and how much plaintiffs could recover in damages and/or restitution, the Superior Court would have to decide whether L.A. Cellular's rates were reasonable in light of the service provided and, if the court were to determine that the rates were unreasonably high, what rate L.A. Cellular should have charged. Such an exercise would completely entangle the court in prohibited rate setting.

At the hearing on L.A. Cellular's motion to strike plaintiffs' claims for monetary relief, the Superior Court recognized -- and plaintiffs' counsel essentially conceded -- that the resolution of their monetary claims would require the court to engage in a prohibited evaluation of L.A. Cellular's rates:

> THE COURT: Well, enlighten me. You say you don't have a damage model worked out at this point, but if you are asking for dollar damages, aren't they going to be based upon -- based upon a false advertising claim? *Aren't they going to be based on the fact that the subscribers did not get what they thought they were getting and the service was not worth as much as it was advertised to be worth?*
>
> [COUNSEL FOR PLAINTIFFS]: In some way, yes, Your Honor, but the emphasis I think will be on what the -- you are right. I think that *the class members' damages will be measured by what they lost*, what they lost, and *in order to determine that, you have to look at what they paid.* I think that much is true. But I don't think that that would enmesh the Court in rate making, and I think that's what every other court in this particular context against the cellular telephone companies has concluded.

> THE COURT: Well, it seems like another way of saying that they were overcharged and didn't get services they thought they were getting, and in a way, that's then changing the rates or regulating the rates, is it not?

R.T. 14-15 (Feb. 11, 1999, emphasis added) (Plfs. Appx. Tab 9). The Superior Court reiterated this reasoning in concluding that plaintiffs' claims for monetary relief "violate the preemptive mandate of Section 332 of the Federal Communications Act" because resolution of those claims "would require the state court to regulate or adjust rates which is prohibited by federal law." Minute Order at 1 (Feb. 11, 1999) (Plfs. Appx. Tab 10).

The Superior Court's conclusion was correct, because plaintiffs' claim for monetary relief seeks nothing other than judicial regulation of L.A. Cellular's rates. While plaintiffs protest that their monetary claims involve merely a "remedy" for L.A. Cellular's purportedly "false" advertising, the Supreme Court has recognized that challenges to rates take many forms and go beyond actions that simply allege that the rate itself is unreasonable. *Central Office Telephone,* 118 S. Ct. at 1963. Plaintiffs cannot dispute that, to provide the remedy they seek, the Superior Court would have to calculate the difference between the rates that L.A. Cellular actually charged and the rates that the court determines fall within a zone of reasonableness. However characterized, the monetary relief that plaintiffs seek would, if granted, amount to a partial refund on L.A. Cellular's service fees and thus regulate the rates that L.A. Cellular charges its subscribers. Resolution of those claims, therefore, is preempted by federal law.

Plaintiffs seek to avoid the preemptive effect of the Federal Communications Act by asserting that their claims for monetary relief fall within the statutory "savings clause," which provides that while state *rate* regulation is prohibited, the statute "shall not prohibit a State from regulating the

other terms and conditions" of cellular service. 47 U.S.C. § 332(c)(3)(A) (emphasis added). As demonstrated above, however, judicial resolution of plaintiffs' claims for monetary relief would enmesh the Superior Court in *rate* regulation, and is prohibited by the express preemptive provision. The savings clause does not preserve claims that are precluded by the statute itself. *See Central Office Telephone*, 118 S. Ct. at 1965 (savings clause preserves only those rights that are not inconsistent with federal requirements, and "cannot in reason be construed as continuing in [customers] a common law right, the continued existence of which would be absolutely inconsistent with the Act") (internal quotations omitted). Thus, the savings clause does not preserve plaintiffs' claims for monetary relief in a case where rate issues are implicated.

B. The Superior Court's Decision Is Consistent With The Weight Of Authority

This Court's decision in *Day v. AT&T Corp.*, 63 Cal. App. 4th 332 (1998), squarely addresses the preemption question in a related setting. In *Day*, the plaintiffs sought injunctive and monetary relief for allegedly misleading advertising practices relating to the "rounding up" of time charged to AT&T prepaid calling cards. The Court held that, while plaintiffs were free to seek an injunction, they could not seek monetary relief because awarding such relief would require the court to engage in rate regulation:

> To the extent [plaintiffs] do not seek a monetary recovery they may proceed with their action for injunctive relief. They may not seek to recover any money from [defendants] whether they label their request one for disgorgement or otherwise. The net effect of imposing any monetary sanction on the [defendants] will be to effectuate a rebate . . . .

Id. at 337. The *Day* Court observed that the resolution of the plaintiffs' claim for monetary relief "would enmesh the trial court in a determination of the reasonableness of the rates, a matter within the exclusive province of the FCC and the California Public Utilities Commission." *Id.* at 338.

While the preemption issue in *Day* arose in the context of the filed rate doctrine applicable to wire-line telephone carriers, this distinction is neither relevant nor controlling. Indeed, the analysis in the context of federal preemption of rate regulation by statute is even more compelling. As the defendants in *Day* pointed out, "any calculation of the appropriate amount [of the defendants' profits] to disgorge would require the trial court's determination of how much of the . . . profits [defendants] can keep, and how much they must relinquish, which would necessitate a finding regarding the reasonableness of the rate charged." *Id.* at 338. While such a finding was precluded in *Day* because it was within the jurisdiction of the regulatory agencies, the identical finding would be precluded in this case because Congress has expressly prohibited state involvement in cellular telephone rates. 47 U.S.C. § 332(c)(3)(A). Just as the resolution of the monetary claims in *Day* would have required the trial court to determine the reasonableness of the rates charged, resolution of the monetary claims presented by plaintiffs in their complaint would require such a determination and, as a result, is preempted by federal law.

Courts in other jurisdictions have dismissed on preemption grounds cases in which the plaintiffs' claims would require the trial court to determine a reasonable rate or otherwise become enmeshed in rate setting. *See, e.g., In re Comcast Cellular Telecom. Litigation*, 949 F. Supp. 1193 (E.D. Pa. 1996); *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112 (S.D.N.Y. 1992). As the *Comcast* court observed, a claim for monetary relief that re-

quires the court to engage in rate setting is preempted no matter how cleverly labeled:

> An examination of the Plaintiffs' complaint and the remedies they seek demonstrates that the driving force behind their allegations is a desire to impose restrictions not only upon the way in which Comcast advertises its rates but also upon the rates which Comcast may charge for mobile telephone services. . . . The remedies they seek would require a state court to engage in regulation of the rates charged by a [cellular service] provider, something it is explicitly prohibited from doing.

949 F. Supp. at 1201.

The only arguably contrary decision identified by plaintiffs is *Tenore v. AT&T Wireless Services, Inc.*, 962 P.2d 104 (Wash. 1998), *cert. denied*, 119 S. Ct. 1096 (1999), in which the plaintiffs challenged the adequacy of the service provider's disclosures concerning the practice of "rounding up" cellular airtime. The court in *Tenore* concluded that the plaintiffs' claims were not preempted because they were not challenging the "reasonableness" of the practice (or of the rate itself), but only the alleged "non-disclosure" of it. Of course, *Tenore* is not binding on this Court. Moreover, it is wrongly decided, and it cannot be reconciled with this Court's decision in *Day*. If the calculation and imposition of damages for purported misrepresentations requires the state court to determine what rate *should have* been charged had the information in question been accurate, as the *Day* Court correctly recognized, such a claim improperly implicates the state court in the regulation of cellular rates.

The remainder of the numerous cases from other jurisdictions on which plaintiffs rely have nothing to do with the issue of whether claims for monetary relief would involve impermissible rate setting, but rather deal

with the entirely distinct question of whether a plaintiff's consumer protection and/or fraud claims are *completely* preempted such that they would support removal jurisdiction.[4] For example, plaintiffs assert that *DeCastro v. AWACS*, 935 F. Supp. 541 (D.N.J. 1994), stands for the proposition that state claims arising from a failure to disclose billing practices are not preempted. *See* Pet. at 23. The case, in fact, does not support this proposition at all. The *DeCastro* court held that plaintiffs' consumer fraud claims were not *completely* preempted, and thus were not removable to federal court. In so holding, the court expressly recognized that those claims might well be preempted. 935 F. Supp. at 555 ("The defendant is free to argue in state court that the class claims . . . are preempted by federal law").

The other out-of-state authorities cited by plaintiff stand for the same unexceptionable proposition. In *Sanderson v. AWACS*, 958 F. Supp. 947 (D. Del. 1987), plaintiff claimed that defendant's billing practices violated the state's Consumer Fraud Act. The court reviewed in detail the analysis of "complete preemption jurisprudence" and concluded that the claims did not implicate directly the Act. There was, therefore, no basis for original

[4] Ordinarily, federal preemption is raised as a defense to a plaintiff's state law claims and may not serve as a basis for original federal court jurisdiction. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, (1987). In certain limited circumstances, however, the Supreme Court has determined that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63-64. In the limited circumstances where a federal statute creates a federal cause of action *and* provides a clear indication of congressional intention to permit removal despite the pleading of essentially state law claims, such "complete preemption" can support removal jurisdiction. *See Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936, 942 (3d Cir. 1988). Absent such a clear indication, however, preemption is asserted as a defense (as L.A. Cellular has asserted it in this case) to state law claims where the federal statute has expressly divested the state courts of jurisdiction to consider a particular issue (such as claims that set, or evaluate, cellular service rates).

federal question jurisdiction, and the court remanded the case to state court. The court was never asked to consider, nor did it need to consider, whether the plaintiff's claim for monetary relief was preempted as impermissible rate regulation. In *Bauchelle v. AT&T Corp.*, 989 F. Supp. 636 (D.N.J. 1997), plaintiff's purported class asserted claims under the New Jersey Consumer Fraud Act for alleged misrepresentation by defendant about its single-rate calling plan. Finding no federal question jurisdiction, the court simply remanded the case to state court. In doing so, the court observed that "the mere existence of a colorable issue as to whether federal law preempts the state law claims pleaded in the complaint is insufficient to provide a basis for removal to federal court." 989 F. Supp. at 642. Again, similar to the caveat in *DeCastro*, this court acknowledged the real possibility that the plaintiff's claims *could* be preempted by federal law, notwithstanding that the claims did not provide a basis for removal jurisdiction to federal court.[5]

The Superior Court's decision in this case is entirely consistent with *DeCastro* and the other cases cited by plaintiffs in their petition. The court below did *not* decide that plaintiffs' state-law claims were *completely* preempted; rather, the Superior Court determined that the claims for injunctive

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[5] *See also Weinberg v. Sprint Corp.* 165 F.R.D. 431 (D.N.J. 1996) (case remanded because plaintiff's claims alleging fraud in certain promotional campaign for long distance telephone service not completely preempted and therefore no federal question removal jurisdiction); *KVHP TV Partners v. Channel 12*, 874 F. Supp. 756 (E.D. Tex. 1995) (plaintiff's claims, including those under the Texas Deceptive Trade Practices Act, not completely preempted and therefore the court remanded to state court noting that defensive preemption does not serve a basis for federal court jurisdiction); *Bennett v. Altel Local Communications*, 1996 WL 1054301 (M.D. Ala. 1996) (plaintiff's action attacking the defendant's billing practices for cellular telephone service not completely preempted, therefore the case remanded to state court).

and declaratory relief could proceed at this time. The determination that the claims for monetary relief would require judicial regulation of rates, and are therefore preempted, is in no way inconsistent with the cases on which plaintiffs rely. No case cited by the plaintiffs in their petition stands for the proposition that where a plaintiff's claims, however pleaded, require a court to evaluate, set, refund, establish, or otherwise regulate the rates charged for cellular service, such claims would not be preempted by federal law. Indeed, the litany of authority from other jurisdictions presented by plaintiffs does not dispute (and indeed supports) this basic, and unassailable, proposition. Thus, the cases on which plaintiffs rely do not support the extraordinary relief the plaintiffs seek.

C. The Superior Court's Decision Will Not Interfere With The Enforcement Of Consumer Protection Laws

Perhaps recognizing that their position is legally untenable, plaintiffs resort frequently to the public policy argument that "the trial court's reasoning will eviscerate consumer protections afforded California residents as against the wireless telephone industry." Pet. at 3; *see also* Pet. at 47 (". . . effective immunity from prosecution . . . .") That is simply not true. Nor, as plaintiffs claim, would wireless carriers be "free to disseminate false and deceptive advertising" absent the issuance of a writ. Pet. at 4. Private and governmental plaintiffs are free to pursue claims for injunctive and declaratory relief to redress any consumer protection issues they deem sufficiently important to litigate. While monetary relief may not be available in state court actions (such as this one) that implicate rate setting, that is a decision that the United States Congress has made and that cannot be ignored or disregarded by this Court.

Moreover, plaintiffs are wrong to suggest that adherence to federal law will somehow "immunize" cellular carriers. *See* Pet. at 3. Plaintiffs remain free to bring a claim at the FCC on in federal court asserting unjust or unreasonable charges or practices directly under the Act. *See* 47 U.S.C. §§ 201(b), 207. Indeed, the FCC has broad powers to fashion remedies to address unjust or unreasonable charges or practices. Thus, plaintiffs cannot be heard to cry that they (or the public at large) are without an adequate remedy.

III.

CONCLUSION

Plaintiffs' petition presents no burning issues of "first impression." California consumers today have exactly the same rights -- and are subject to exactly the same restrictions imposed by federal law -- that apply to all other cellular telephone consumers. Any claim, whether brought in the form of a consumer protection action or otherwise, that calls for a state court to set, adjust or otherwise evaluate the reasonableness of cellular telephone rates, is preempted by Section 332(c)(3)(A) of the Federal Communications Act. The Superior Court properly granted L.A. Cellular's motion to strike plaintiffs' claims for monetary relief, because resolution of those

claims would be preempted by that Act. For the foregoing reasons, the Petition for a Writ of Mandate or Other Extraordinary Relief should be denied.

Respectfully submitted.

DATED: May 12, 1999

GIBSON, DUNN & CRUTCHER LLP
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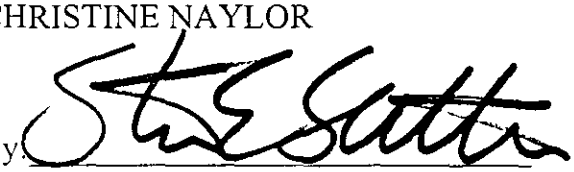
MARK A. PERRY
CHRISTINE NAYLOR

By 
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LT991320.010

DECLARATION OF SERVICE BY MAIL

J. Levine declares as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 So. Grand Avenue, Los Angeles, California 90071, in said County and State; I am readily familiar with Gibson, Dunn & Crutcher's practice in its above-described Los Angeles office for the collection and processing of correspondence for mailing with the United States Postal Service; pursuant to that practice, envelopes placed for collection at designated locations during designated hours are deposited with the United States Postal Service with first class postage thereon fully prepaid that same day in the ordinary course of business; on the **12th day of May, 1999**, I served the attached:

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown:

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and by then sealing and placing said envelope(s) for collection at a designated location at Gibson, Dunn & Crutcher's offices at 333 So. Grand Avenue, Los Angeles,

California 90071 during designated hours, for mailing on the above date, following ordinary business practice.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this **12th day of May, 1999**, at Los Angeles, California.

J. Levine

LT981280.080

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SERVE COPIES OF THE ENCLOSED WRIT ON ALL PARTIES AND THE TRIAL COURT. THEN RETURN THE

FNV

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARCIA SPIELHOTZ et al., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES CELLULAR TELEPHONE COMPANY et al., Real Parties in Interest.	B131655 (Super. Ct. No. BC186787) (Wendell Mortimer, Jr., Judge) ALTERNATIVE WRIT OF MANDATE

BY THE COURT:

The petition for writ of mandate, filed May 7, 1999, has been read and considered. All proceedings in the action are stayed pending further order of this court.

The superior court is required either to:

(a) vacate the order(s) entered on February 11, 1999, in Los Angeles County Superior Court Case No. BC186787, entitled *Marcia Spielholz et al.* v. *Los Angeles Cellular Telephone Company et al.*, and thereafter make a new and different order, or

(b) in the alternative

SHOW CAUSE before this court in its courtroom at 300 South Spring Street, 3rd Floor, Los Angeles, California, on August 10, 1999, at 9:30 a.m. why a peremptory writ of mandate ordering you to do so should not issue.

Exhibit 7

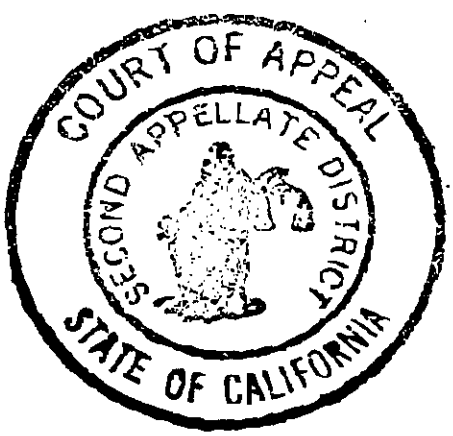
Counsel for real party in interest may file and serve opposition on or before June 29, 1999.

Any response shall be filed and served no later than July 12, 1999.

By order of this court.

ATTEST my hand and the seal of this court

this _____ day of JUN - 8 1999.



JOSEPH A. LANE, Clerk

By _____
Deputy Clerk

Stephen Harry Cassidy
Lieff Cabraser Heimann & Bernstein
275 Battery Street
30th Floor
San Francisco, CA 94111-3339

Case Number B131655
Division 3
Marcia Spielholz, et al.
vs.
S.C.L.A.
Los Angeles Cellular Telephone Company, et al.

NOTICE:
SERVE COPIES OF THE ENCLOSED
WRIT ON ALL PARTIES AND THE
TRIAL COURT. THEN RETURN THE
ORIGINAL WITH PROOF OF SERVICE.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT,
DIVISION 3
No. B131655

Marcia Spielholz, Debra Petcove and the Wireless Consumers' Alliance

Petitioners,

vs.

The Superior Court of Los Angeles County

Respondent,

Los Angeles Cellular Telephone Company and AT&T Wireless Services, Inc.

Real Parties in Interest.

From the Superior Court For Los Angeles County, Case No. BC186787
Wendell Mortimer, Jr., Judge

PROOF OF SERVICE BY OVERNIGHT MAIL

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Attorneys for Plaintiffs/Petitioners

I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is 275 Battery Street, San Francisco, California 94111-3339.

I am readily familiar with Lieff, Cabraser, Heimann & Bernstein, LLP's practice for collection and processing of documents for service via overnight mail, and that practice is that the documents are delivered in-hand to an authorized overnight mail carrier the same day as the date listed on this Proof of Service.

On June 10, 1999, I served the within document(s) described as:

1. **ALTERNATIVE WRIT OF MANDATE; and**
2. **PROOF OF SERVICE BY OVERNIGHT MAIL**

on the persons listed below by overnight mail addressed as follows:

Hon. Wendell Mortimer, Jr.
Los Angeles Superior Court
Department 56
111 N. Hill Street
Los Angeles, CA 90012

Steven E. Sletten
Christine Naylor
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on June 10, 1999.

Edmund Gomez

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARCIA SPIELHOTZ et al., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES CELLULAR TELEPHONE COMPANY et al., Real Parties in Interest.	B131655 (Super. Ct. No. BC186787) (Wendell Mortimer, Jr., Judge) ALTERNATIVE WRIT OF MANDATE

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(b) in the alternative

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Counsel for real party in interest may file and serve opposition on or before June 29, 1999.

Any response shall be filed and served no later than July 12, 1999.

By order of this court.

ATTEST my hand and the seal of this court

this _____ day of JUN - 8 1999.

JOSEPH A. LANE, Clerk

By M. GAVINSKI
Deputy Clerk

William S. Lerach
Milberg Weiss Bershad Hynes & Lerach
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Suite 1800
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Case Number B131655
Division 3
Marcia Spielholz, et al.
vs.
S.C.L.A.
Los Angeles Cellular Telephone Company, et al.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARCIA SPIELHOLZ et al.,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

LOS ANGELES CELLULAR TELEPHONE COMPANY et al.,

Real Parties in Interest.

B131655

(Super. Ct. No. BC186787)
(Wendell Mortimer, Judge)

ORDER STAYING PROCEEDINGS

THE COURT:

Proceedings in the trial court and in this court are stayed pending a ruling by the Federal Communications Commission on a petition for a determination whether the Federal Communications Act preempts state courts from awarding monetary relief as a remedy for fraud and false advertising claims. This court intends to defer ruling on the instant petition pending action by the FCC.

However, in the event petitioners fail to proceed expeditiously with the FCC petition, the stay will be lifted. Counsel for the parties are directed to keep this court advised of the status of the FCC matter.

Exhibit 8

William S. Lerach
Milberg Weiss Bershad Hynes & Lerach
600 West Broadway
Suite 1800
San Diego, CA 92101

Case Number B131655
Division 3
Marcia Spielholz, et al.
vs.
S.C.L.A.
Los Angeles Cellular Telephone Company, et al.

1ST STORY of Level 1 printed in FULL format.

The Washington Post

February 23, 1999, Tuesday, Final Edition

SECTION: FINANCIAL; Pg. E01

LENGTH: 711 words

HEADLINE: Cell-Phone Billing Suit To Proceed; High Court Doesn't Halt Rounding Case

BYLINE: Mike Mills, Washington Post Staff Writer

BODY:

For as long as cellular telephones have been around, billing computers have rounded call lengths up to the next minute, so that a call lasting one minute and one second is billed as two minutes.

But consumers opposed to that practice won a legal victory yesterday, when the Supreme Court opted not to stop a class action suit accusing AT&T Wireless of overcharging by rounding up this way. The court, without comment or dissent, declined to hear arguments on a jurisdictional issue that might have halted the case.

AT&T contends that regulating cellular pricing is the job of the Federal Communications Commission, not the state of Washington, where the suit was filed.

The high court's refusal to hear the case means the state court can proceed to the central question of whether AT&T has misled its customers through its billing practices. It also opens AT&T and other wireless companies to pending and future suits in other states.

"AT&T has treated its customers very well, and I believe we will be vindicated in the court," said Bob Stokes, associate general counsel for AT&T Wireless. "It was clear to our customers at all times what our billing practices were and we'll establish that."

But if the customers prevail, the case could force major changes in the way wireless phone companies do business. The carriers could lose millions of dollars in revenue and be forced to spend millions more to upgrade their billing systems to charge by the second instead of the minute.

A switch to per-second billing would cost the industry $ 530 million in service revenue for 1998, a 2 percent decrease, according to Kent Olson, an analyst for the District-based Strategis Group.

Exhibit 9

"If a company like AT&T changed from per-minute to per-second, that's an enormous hit on their revenue stream," said Tim Donahue, president of Nextel Communications Inc. of McLean and a former AT&T Wireless executive. "When they even think about the prospect, it gives them the willies."

Per-minute billing has been the norm for the wireless industry since it began in the early 1980s. Nextel is practically alone in the industry in offering per-second billing, a practice it pioneered more than a year ago.

Feeling pressure, US West Inc. in July 1997 agreed to settle a billing suit, without admitting wrongdoing, for more than $ 10 million.

American Online Inc. in 1996 agreed to pay $ 22 million in free online time to settle 11 private class action lawsuits that accused the company of improper billing practices, including rounding off time spent online to the next full minute.

Cellular carriers borrowed the per-minute method from the long-distance industry, where many companies continue to use it. A U.S. Appeals Court in 1997 upheld dismissal of a fraud case against MCI Communications Corp., holding that per-minute billing was a "standard and traditional practice" of the long-distance industry that misled no reasonable consumer.

The cellular industry won protection from state regulators in 1993, when Congress passed a law saying "no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service." But the law did not bar states from regulating the other terms and conditions of these services.

The class action suit against AT&T Wireless was filed in 1995, the year AT&T purchased McCaw Cellular Communications Corp., at that time the largest wireless company in the country. The suit accuses AT&T of misrepresentation, fraud and violations of the state consumer protection act by claiming the company didn't adequately disclose its practice of charging in full-minute increments.

Stokes said AT&T has always informed its customers that it billed by the minute. "This is something that is clear to our customers and always has been," he said.

The AT&T suit is one of several similar class action lawsuits filed against various cellular companies by Seattle attorney Steve Berman, who said he became interested in the issue when a consumer called him to complain about the per-minute billing practice.

"I'm a heavy cell-phone user, and as a consumer I don't think anyone wants to pay for something they don't get," Berman said.

LANGUAGE: ENGLISH

LOAD-DATE: February 23, 1999

DECLARATION OF SERVICE BY MAIL

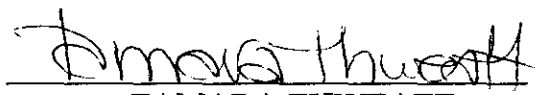
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 600 West Broadway, Suite 1800, San Diego, California 92101.

2. That on July 15, 1999, declarant served the APPENDIX OF EXHIBITS IN SUPPORT OF PETITION FOR DECLARATORY RULING by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of July, 1999, at San Diego, California.



TAMARA THWEATT

LA CELLULAR
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(July 9, 1998)

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